Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

In re:

BARBARA M. STONE, individually and as Trustee for Robert L. Stone, Inc., Defined Benefit Pension Plan, ELIZABETH C. MILLER, VERNIE MILLER, LILLIAN HAZEL, and CONSTANTIN POPA,

Petitioners.

Petition for Writ of Mandamus and Prohibition to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

HERBERT STETTIN, ESQ.
HERBERT STETTIN, P.A.
One Biscayne Tower
Suite 3270
Two S. Biscayne Boulevard
Miami, Florida 33131
Tel. 305/374-3353
Counsel for Barbara Stone and Constantin Popa

MICHAEL H. MOIRANO, ESQ.
Counsel of Record
PATRICIA S. SPRATT, ESQ.
NISEN & ELLIOTT
200 W. Adams Street
Suite 2500
Chicago, Illinois 60606
Tel. 312/346-7800
Co-counsel for all Petitioners

FRANCIS CARTER, ESQ.
JANIE LOCKE ANDERSON, ESQ.
COLL DAVIDSON CARTER SMITH SALTER & BARKETT
3200 Miami Center
201 S. Biscayne Boulevard
Miami, Florida 33131
Tel. 305/373-5200
Co-counsel for Petitioners Elizabeth C. Miller, Vernie Miller and Lillian Hazel

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I. QUESTION PRESENTED

The sole issue raised by this petition is whether the bankruptcy court, as a non-Article III court, has jurisdiction to adjudicate an action filed as a bankruptcy adversary proceeding that seeks to recover fraudulent monetary transfers and/or preferential payments from a defendant who is not a claimant against the bankrupt estate and who has filed a jury demand.

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IV. JURISDICTIONAL STATEMENT

Jurisdiction in this Court to entertain petitioners' Petition for Writ of Mandamus and Prohibition is predicated on 28 U.S.C. § 1651(a).

V. STATEMENT OF FACTS

On March 31, 1993, Jack Stein, as Chapter 11 Trustee of the Estate of Omni Capital Group, Ltd. ("Trustee"), filed a series of complaints, naming the petitioners as defendants therein, in the United States Bankruptcy Court for the Southern District of Florida, as matters Nos. 93-0310, 93-0311, 93-0312, 93-0313, 93-0335, and 93-0343 (the "adversary proceedings").[1] In those actions, the Trustee is seeking to avoid and recover certain payments alleged to be fraudulent transfers and/or preferential payments.[2]

In response to the Trustee's complaints, petitioners, who are not claimants against the bankrupt's estate, each filed motions styled "Motion to Withdraw Reference and Demand for Jury Trial and Memorandum of Law in Support Thereof" ("motions to withdraw the reference") with the United States District Court for the Southern District of Florida.

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[1] All of the petitioners in this matter are listed in the caption. The remaining parties are: Jack Stein, as Chapter 11 Trustee of the Estate of Omni Capital Group, Ltd.; Circuit Judges R. Lanier Anderson, Joel F. Dubina and Black, of the United States Court of Appeal for the Eleventh Circuit; District Judge Shelby Highsmith of the United States District Court for the Southern District of Florida; and Bankruptcy Judge Robert A. Mark of the United States Bankruptcy Court for the Southern District of Florida.

[2] The Trustee is seeking to recover payments totalling in excess of $1,650,000.00.

Concurrently with the motions to withdraw the reference, certain petitioners also filed in the bankruptcy court a "Motion to Abate and Suspend the Deadlines and Trial Date Set in the Order Setting Trial and Setting Pre-Trial Conference." In the motions to abate, petitioners requested, among other things, that the bankruptcy court abate the adversary proceedings as to trial and adjudication of dispositive motions pending a ruling by the district court on the motions to withdraw the references.

On May 25, 1993, at the conclusion of a hearing, the bankruptcy court entered an order denying the motions to abate as to pretrial matters, including adjudication of dispositive motions. At the same hearing, in the context of a colloquy with the court and the Trustee's counsel concerning scheduling further proceedings, petitioners' counsel advised the court that petitioners would seek leave to appeal, and stay pending appeal, whereupon the court informed petitioners that it had no intention of entertaining such relief and expressly directed petitioners to seek such relief in the district court in the first instance.

Certain petitioners filed in the bankruptcy court a notice of appeal ("notice") and "Motion for Leave to Appeal," pursuant to 28 U.S.C. § 158(a) ("motion for leave to appeal"), seeking appeal of the bankruptcy court's order.

While all of the above motions were pending, on June 17, 1993, the Trustee served upon the petitioners his "Motion for Summary Judgment" in all the preference and fraudulent transfer actions ("motion for summary judgment"). The Trustee's motions for summary judgment are set for hearing on August 18, 1993. The bankruptcy court has indicated that it will decide these potentially dispositive motions despite the petitioners' challenge to its jurisdiction and the pendency of the motions to withdraw the references.

On June 25, 1993, certain petitioners filed with the United States District Court for the Southern District Florida, and served on the Trustee, an Emergency Motion for Stay Pending Appeal ("motion for stay").

On July 23, 1993, Judge Shelby Highsmith of the United States District Court for the Southern District of Florida consolidated matters numbered 93-0313, 93-0335, and 93-0343, but not 93-0310, 93-0311, and 93-0312.[3]

On August 6, 1993, Judge Highsmith entered an order granting petitioners Elizabeth Miller, Vernie Miller, and Lillian Hazel's motion to withdraw reference only as to the trial of any legal causes of action, and affirming the reference in all other respects, including hearing and determination of dispositive motions. The judge further ruled that all remaining motions, including petitioners' motions for leave to appeal and for stay pending appeal, are moot. (A copy of the district court's order is reproduced in the Appendix A hereto).

Petitioners filed their Petition for Writ of Mandamus and Prohibition with the Eleventh Circuit on August 12, 1993, along with an "Emergency Motion for Stay" pending a ruling on their Petition. On August 16, 1993, the Eleventh Circuit, Judges Anderson, Dubina, and Black, denied their petition and their motion for stay. (A copy of the Eleventh Circuit's order is reproduced in the Appendix B hereto).

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[3] The defendants in the consolidated matters are Elizabeth C. Miller, et al., Vernie H. Miller, and Lillian Hazel. The defendants in the remaining matters are Barbara M. Stone and Constantin Popa.

VI. ARGUMENT

Petitioners Barbara M. Stone, individually and as Trustee for the Robert L. Stone, Inc., Defined Benefit Pension Plan, Elizabeth C. Miller, Vernie Miller, Lillian Hazel, and Constantin Popa, pursuant to 28 U.S.C. § 1651(a) and Supreme Court Rule 20, hereby petition this Court to issue a writ of mandamus directing the Honorable Anderson, Dubina, and Black, Judges of the United States Court of Appeals for the Eleventh Circuit, to enter an order directing the Honorable Shelby Highsmith, United States District Court for the Southern District of Florida to withdraw the reference in bankruptcy adversary proceedings Nos. 93-0310, 93-0311, 93-0312, 93-0313, 93-0335, and 93-0343, and a writ of prohibition prohibiting the Honorable Robert A. Mark, Judge of the United States Bankruptcy Court for the Southern District of Florida, from adjudicating those adversary proceedings.

A. The Writ Sought is in Aid of this Court's Appellate Jurisdiction

The relief petitioners seek in this court unquestionably is drastic, authorized only in extraordinary situations. *Sun v. Forrester*, 939 F.2d 924, 926 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1712 (1992). These writs are "appropriate to remedy a clear usurpation of power or abuse of discretion 'when no other adequate means of obtaining relief is available.' " *Id. See also In re Fink*, 876 F.2d 84, 84, (11th Cir. 1989). More importantly, " '[t]he traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' " *Mallard v. United States Dist. Court*

for the S. Dist. of Iowa, 490 U.S. 296, 109 S. Ct. 1814, 1822 (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26, 33 S. Ct. 938, 941 (1943)). As will be demonstrated, this petition meets the standard for the writs to issue.

B. This is an Extraordinary Situation

In the exceptional case, a writ is appropriate when the issue raised is an unresolved question of law. *In re Continental Inv. Corp.*, 637 F.2d 1, 7 (1st Cir. 1980). Significantly, both mandamus and prohibition are proper to protect a constitutional right. *See, e.g., Allegheny Intern. v. Allegheny Ludlum Steel*, 920 F.2d 1127, 1133 (3d Cir. 1990) ("it is 'the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to a trial by jury.' *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472, 82 S. Ct. 894, 897, 8 L. Ed. 2d 44 (1962).").

This petition arises out of an extraordinary situation in that the underlying issue is an unresolved question of constitutional law—the extent of a non-Article III bankruptcy court's authority to adjudicate fraudulent conveyance and preference claims that are traditionally private-rights disputes. No court has considered the issue so broadly framed. Petitioners urge this Court to examine and synthesize language from its opinions in *Northern Pipeline Construction Co. v. Marathon Pipe Line Company*, 458 U.S. 50, 102 S. Ct. 2858 (1982) (plurality opinion) and *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782 (1989), to conclude that bankruptcy courts have no authority at all to adjudicate these types of claims which involve purely private rights. Therefore, this is an extraordinary situation with consequences extending far beyond the boundaries of these cases.

C. The Bankruptcy Court has Usurped Power

The Constitution assigns the judicial power of the United States only to those judicial officers delineated in Article III. Although Congress may establish non-Article III legislative courts, "[f]irmly established in our historical understanding of the constitutional structure," is that only Article III courts have jurisdiction over those private "matters from their nature subject to 'a suit at common law[.]' " *Northern Pipeline*, 448 U.S. at 70, 102 S. Ct. at 2871 n.25. Indeed, "[p]rivate-rights disputes . . . lie at the core of the historically recognized judicial power." *Id.* at 70, 102 S. Ct. at 2871.

It is not necessary for the purpose of this petition to present an exegesis of all matters that implicate private rights. In *Crowell v. Benson*, 285 U.S. 22, 52 S. Ct. 285 (1932) the Court broadly defined private rights as those involving "the liability of one individual to another under the law as defined." *Id.* at 51, 52 S. Ct. at 292. Here, because the Trustee's adversary proceeding against the petitioners is a claim for the recovery of alleged fraudulent monetary transfers and/or preferential payments to them by the bankrupt, the claim is grounded in the private rights between these individuals. Notably, this Court stated in dicta in *Granfinanciera* that fraudulent conveyance actions are private rights actions.[4]

This Court explained that actions to recover fraudulent conveyances were known at common law, and were con-

[4] Although *Granfinanciera* specifically addressed only fraudulent conveyance actions, the Court's holding has been extended to preference actions as well. *See, e.g., Lagenkamp v. Culp*, 111 S. Ct. 330, 331 (1990) (per curiam); *Gower v. Farmers Home Admin.*, 899 F.2d 1136, 1140 n.9 (11th Cir.), *cert. denied*, 498 U.S. 981 (1990).

ducted before juries. 109 S. Ct. at 2790-91. Moreover, the Court stated that

> There can be little doubt that fraudulent conveyance actions by bankruptcy trustees—suits which we said in *Schoenthal v. Irving Trust Co.* "constitute no part of the proceedings in bankruptcy but concern controversies arising out of it"—are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res. They therefore appear matters of private rather than public right.

Id. at 2798 (citations omitted).

Prior to passage of the Bankruptcy Reform Act of 1978, the Court noted, suits to recover fraudulent conveyances and preferences were filed in the federal district courts or in state courts. Although related to bankruptcy proceedings, fraudulent conveyance and preference actions brought by a trustee in bankruptcy were deemed separate, plenary suits. *Id.* at 2794.

The Bankruptcy Amendments and Federal Judgeship Act of 1984, however, designated fraudulent conveyance and preference actions as "core" proceedings which bankruptcy judges may "hear and determine," that is, triable by a non-Article III court sitting without a jury. 28 U.S.C. § 157(b)(2)(F) and (H). But, the *Granfinanciera* Court continued, a fraudulent conveyance action does not lose its common law, private-rights attribute by Congress's simple expedient of denominating it a "core proceeding," stating:

> This purely taxonomic change cannot alter our Seventh Amendment analysis. Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it

> attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.

Granfinanciera, 109 S. Ct. at 2800. Indeed, in *Northern Pipeline*, the Court emphatically stated that "Congress cannot 'withdraw from [Art. III] judicial cognizance *any* matter which *from its nature*, is the subject of a suit at the common law[.]' " *Northern Pipeline*, 458 U.S. at 69, 102 S. Ct. at 2870 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856)) (emphasis in original).

Key to the Court's resolution of the issue was that petitioners there, like petitioners here, had made no claim against the bankrupt estate. Without such a claim, the trustee can recover only by a plenary action, brought in federal court ancillary to the bankruptcy proceeding. *Id.* at 2798. Indeed, in *Lagenkamp v. Culp*, 498 U.S. ____, 111 S. Ct. ____, 112 L. Ed. 2d 343 (1990) (per curiam), the Court explained that

> In *Granfinanciera* we recognized that by filing a claim against a bankruptcy estate the creditor triggers the process of "allowance and disallowance of claims," thereby subjecting himself to the court's equitable power. . . . If a party does *not* submit a claim against the bankruptcy estate, however, the trustee can recover allegedly preferential transfers only by filing what amounts to a legal action to recover a monetary transfer. In those circumstances the preference defendant is entitled to a jury trial.

112 L. Ed. 2d at 348 (emphasis in original). *See also Gower v. Farmers Home Admin.*, 899 F.2d 1136, 1140 n.9 (11th Cir. 1990).

Although labeled a "core" proceeding by Congress, the Court instructs that fraudulent transfer actions cannot be disposed of in the same manner as core proceedings, that is, adjudication by the bankruptcy court. Consequently, a

bankruptcy court has authority to adjudicate an adversary proceeding under only two circumstances: when the matter is a "pure" core proceeding under 28 U.S.C. § 157(b), or under the consensual referral provision of 28 U.S.C. § 157(c)(2).[5] *Id.*

Although no court has specifically addressed the precise jurisdictional issues raised here, the Eleventh Circuit, in dicta, has cast serious doubt on the constitutional authority of bankruptcy courts to adjudicate fraudulent transfer and preference claims. Relying on this Court's decisions in *Northern Pipeline* and *Granfinanciera*, the Eleventh Circuit has said:

> ". . . the Court's more recent decision in *Granfinanciera, S.A. v. Nordberg*, ____ U.S. ____, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989), appeared to adopt the analysis of the *Northern Pipeline* plurality, and cast doubt on the constitutionality of the bankruptcy courts' authority, under §157(b), to adjudicate certain "core" proceedings without the parties' consent. *Granfinanciera* held that a defendant who has not submitted a claim against a bankruptcy estate has a Seventh Amendment right to a jury trial in a fraudulent-conveyance action brought by a trustee. The Court also strongly suggested—although it specifically avoided holding—that fraudulent-conveyance and voidable-preference actions under 11 U.S.C.A. §§ 547-548 are "private right" claims which "must be tried under the auspices of an Article III court." 109 S.Ct. at 2796; *See*, generally *Id.* at 2794-98, 2802.

Gower, 899 F.2d at 1140 n.9.

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[5] Section 157(c)(2) provides that "the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 [i.e., a non-core proceeding] to a bankruptcy judge." *See also* Bankruptcy Rule 7012(b) ("In non-core proceedings final orders and judgment shall not be entered on the bankruptcy judge's order except with the express consent of the parties.").

In affirming the bankruptcy court references as to hearing and determining case dispositive motions, the district judge found persuasive the holding of the United States District Court for the Northern District of Alabama in *City Fire Equipment Co., Inc. v. Ansul Fire Protection Wormald U.S., Inc.*, 125 B.R. 645 (N.D. Ala. 1989) (en banc). In that case, also an adversary proceeding to recover preferential transfers, after the defendants filed a jury demand the bankruptcy court recommended withdrawal of the reference, concluding it had no jurisdiction. The district court, however, disagreed, interpreting by implication *Granfinanciera* to mean that bankruptcy courts can hear and determine dispositive motions. *Id.* at 646. "This court concludes that the mere filing of a jury demand does not cause the Bankruptcy Court to lose 'jurisdiction' of the action(s) or mandate that the reference be withdrawn." *Id.* at 649.

Petitioners urge here that the district court below, as well as the circuit court, as demonstrated by its reliance on *City Fire Equip.*, failed to grasp the substance of their argument. Petitioners are not invoking their Seventh Amendment right to a jury trial. They do not argue that by filing a jury demand the bankruptcy court loses jurisdiction. Their argument is that the bankruptcy court has no jurisdiction whatsoever to adjudicate private-rights disputes. The Trustee's action to recover fraudulent and/or preferential transfers is one historically grounded in private rights, constitutionally assigned to Article III courts.

With the template of the foregoing constitutional, decisional, and statutory law laid over the facts of this case, it is clear that the bankruptcy court is without jurisdiction to entertain the Trustee's motion for summary judgment or otherwise adjudicate his fraudulent conveyance and preference claims. Considering that these adversary

proceedings involve adjudication of private rights, each raising a cause of action known at common law, that is the only possible conclusion. Adjudication of private-rights disputes, as these proceedings are, is constitutionally assigned to Article III courts. Congress's classification of the action as a core proceeding does not alter this conclusion. Additionally, petitioners have not consented to proceed in the bankruptcy court, and in fact have sought withdrawal of the references.

The bankruptcy court, therefore, has usurped the judicial power reserved only to Article III courts. The district court's refusal to withdraw the references in their entirety and abate proceedings in the bankruptcy court is nothing more than a relinquishment of its Article III power, and as such, is an abuse of its discretion. The Eleventh Circuit's summary denial of the relief petitioners seek is a further abuse of discretion. Petitioners strongly urge that not only is mandamus appropriate when a court lacks jurisdiction, or exceeds the limits of the jurisdiction that it has, *MGPC, Inc. v. Dept. of Energy*, 673 F.2d 1277, 1284 (Temp. Emer. Ct. App. 1982), but also when it fails properly to exercise its jurisdiction, as both the circuit and district courts have done here.

D. There is No Other Adequate Remedy Available to Petitioners

Petitioners have vigorously pursued every other remedy available to them without success. They filed motions to withdraw the references, but the bankruptcy court proceeded. They filed motions to abate, but the bankruptcy court proceeded. They informed the bankruptcy court they would seek leave to appeal, to which the court responded it would not entertain such relief. They sought leave to appeal to the district court, which has not been granted. And after the bankruptcy court set a date for ruling on

the Trustee's potentially dispositive motion for summary judgment, petitioners filed an emergency motion for stay pending appeal. The court denied that motion. They filed a petition for writ of mandamus and prohibition with the Eleventh Circuit, which also has been denied. In the truest possible sense, this Court is now the court of last resort for petitioners.

If the district court's denial of their motions to withdraw the reference were a final order, petitioners could appeal under 28 U.S.C. § 1291. It is, however, "well-settled that orders granting or denying motions for withdrawal of reference are not final." *Allegheny Intern. v. Allegheny Ludlum Steel*, 920 F.2d 1127, 1131 (3d Cir. 1990) (citing *In re Powelson*, 878 F.2d 976, 979 (7th Cir. 1989) and *In re Kemble*, 776 F.2d 802, 806 (9th Cir. 1985)). *See also In re Barrier*, 776 F.2d 1298, 1299 (5th Cir. 1985). As a result, the writs of mandamus and prohibition are the only remedy available to petitioners. Indeed, as we noted at the outset, " '[t]he traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' " *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 109 S. Ct. 1814, 1822 (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26, 33 S. Ct. 938, 941 (1943)).

Unless this Court issues the writs petitioners seek, the bankruptcy court could proceed to adjudicate all matters raised in these adversary proceedings. That result does violence to the constitutional assignment of private-rights disputes to Article III courts, the consequences of which extend far beyond the boundaries of these proceedings alone.

VII. CONCLUSION

Based on the foregoing demonstration that this petition arises from an extraordinary situation, that the bankruptcy court has usurped power, that the district and circuit courts have abused their discretion, and that the petitioners have no other remedy available to them, they urge this Court to issue a writ of mandamus directing the United States Court of Appeals for the Eleventh Circuit to enter an order directing the United States District Court for the Southern District of Florida to withdraw the references in bankruptcy adversary proceedings Nos. 93-0310, 93-0311, 93-0312, 93-0313, 93-0335, and 93-0343, and a writ of prohibition prohibiting the Honorable Robert A. Mark, Judge of the United States Bankruptcy Court for the Southern District of Florida, from adjudicating these adversary proceedings.

Respectfully submitted,

HERBERT STETTIN, ESQ.
HERBERT STETTIN, P.A.
One Biscayne Tower
Suite 3270
Two S. Biscayne Boulevard
Miami, Florida 33131
Tel. 305/374-3353
Counsel for Barbara Stone and Constantin Popa

MICHAEL H. MOIRANO, ESQ.
Counsel of Record
PATRICIA S. SPRATT, ESQ.
NISEN & ELLIOTT
200 W. Adams Street
Suite 2500
Chicago, Illinois 60606
Tel. 312/346-7800
Co-counsel for all Petitioners

FRANCIS CARTER, ESQ.
JANIE LOCKE ANDERSON, ESQ.
COLL DAVIDSON CARTER SMITH SALTER & BARKETT
3200 Miami Center
201 S. Biscayne Boulevard
Miami, Florida 33131
Tel. 305/373-5200
Co-counsel for Petitioners Elizabeth C. Miller, Vernie Miller and Lillian Hazel

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